the petitioner therefore has made out a case for a winding-up order."

No doubt the remedy sought here is different, but there is no reason why since a declaration coupled with an injunction are what the plaintiff is asking for, the principle governing the relief sought should not be the same. It would appear that the principle is applicable to the plaintiff and whether it is in fact so and whether the facts would ultimately bear it out must be left to the trial court to investigate and go into. It needs to be asked why that although the parties have been carrying on business as partners and the plaintiff has not shown to be at a disadvantage as such he would be willing to enter into a solemn covenant with the defendant to form into a company which has as one of its provisions the effect of expelling him as a director and as a shareholder with all the rights that go with it at the mere stroke of the defendant's pen and according to his whim and fancy. Again it needs to be asked why the plaintiff has chosen to abandon the partnership where he would at common law be protected by being given the right to be heard before he is expelled (see *Blisset* v. *Daniel*[6]) in favour of forming the company, which under our law does not give him that right even if it seems there is bad faith on the part of the person who exercises the right. Why has the plaintiff chosen to abdicate all his rights for the business which he has from the beginning helped to raise. These questions may need to be looked into at the trial since they would bear on the question of whether the company is still in substance a partnership as stated in *Ebrahimi* v. *Westbourne Galleries Ltd. & Ors.*

I do not doubt that if the plaintiff is not allowed this remedy he would suffer irreparable damage. In my view, if the relief is denied, the damage done will hardly be just a matter of revoking any appointment made and restoring the profits accrued. One needs only to examine the various powers and functions given and laid down in the articles to see the extent of the damage that may be incurred. The person appointed as a director and who becomes a member by virtue of the vacancy created under article 21(d) would, it is deemed, be carrying out various duties and functions in the natural course of his duty as a director. He may either alone, or in conjunction with the defendant or on behalf of the company or as a company (he and the defendant being the only shareholders) be transferring share or shares to a person who is not a member under article 21. He may increase or decrease the capital of the company under articles 40 and 44, borrow money under article 47, declare what is the nett profit of the company (whose decision is conclusive) under article 95. He may be doing all these and one or the other of his acts may land the company in loss to the detriment of the plaintiff, but whose concurrence or otherwise in the decision which brings it about is absolutely of no account. And there is apparently nothing plaintiff can do about it since under article 86 the purported director whose appointment may in fact be declared to be null and void later is in the same position as far as his acts are concerned as one who has lawfully and validly been appointed. Counsel for the defendant says that if a third party question arises, it is strictly a matter between the defendant and the third party. But in such an event, will not the writ be issued against the company? I should think so. And being against the company the plaintiff will perforce be called upon to discharge the burden thrust upon the company for which he had in the interim period no say in the running. The company may be so in debt that it may be necessary for reasons which the plaintiff had earlier not been responsible for, to wind it up after all. It seems certain also that not having been a director the plaintiff would also not be able to recover his arrears of remuneration as a director. In my view, it is only doing substantial justice to the case and for the purpose of safely preserving the subject-matter of the action until the rights of the parties are finally determined that defendant be restrained from exercising his rights under article 21(d). I grant the interim injunction therefore subject to an undertaking by the plaintiff as to damages with two sureties.

Costs will be in the cause.

Order accordingly.

Solicitors: *Lim Ewe Hock; Skrine & Co.*

MALAYAWATA STEEL BHD. v. GOVERNMENT OF MALAYSIA & ANOR.

[O.C.J. (Mohamad Azmi J.) July 13, 1974]
[Kuala Lumpur — Civil Suit No. 2263 of 1969]

Equity — Equitable assignment — Assignment of right to receive payment from defendant for steel supplied by plaintiffs to construction company — Assignment conditional, non-absolute and severable — Assignment enforceable only where defendant instructed by construction company to make payment direct to plaintiff — Assignment unenforceable in the absence of such instruction.

The plaintiffs claimed payment of the sum of $215,618.68 being the balance of payment due for the supply of steel to a construction company for the Radio House project of the Government. The claim was based on an equitable assignment alleged to have been made in favour of the plaintiffs with the construction company as assignor and the Government as the debtor. The Government had agreed to pay the cost of the steel supplied direct to the plaintiffs, if so directed from time to time by the construction company.

Held: (1) the equitable assignment in this case was conditional and non-absolute and also severable as it was enforceable only on an *ad hoc* basis when the Government was instructed by the construction company from time to time to make the payment direct to the plaintiffs;

(2) on the facts the equitable assignment was not enforceable and therefore the claim should be dismissed;

(3) as the plaintiffs had taken no action after they come to know that the Government had on two occasions made payment to the construction company instead of to themselves, there was an implied waiver and therefore it became inequitable for the court to enforce the equitable assignment, whatever may be the nature of such assignment;

(4) even if the plaintiffs had proved that the equitable assignment was enforceable, in that it was not conditional or not non-absolute or not severable, the claim would still fail in view of the unsatisfactory evidence as to the amount of steel supplied and its value.

Cases referred to:-

(1) *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* [1904-7] All E.R. Rep. 345.

(2) *Durham Brothers* v. *Robertson* [1898] 1 Q.B. 765 at p. 769.

Authorities cited but not referred to in the judgment: *Re Steel Wing Co., Ltd.* [1920] All E.R. Rep. 292, *Walter & Sullivan, Ltd.* v. *J. Murphy & Sons, Ltd.* [1955] 1 All E.R. 843, *Hughes* v. *Pump House Hotel Co., Ltd.* [1902] 2 K.B. 190, *Cator* v. *Croydon Canal Co.* 160 E.R. 1149, *Williams* v. *Atlantic Assurance Company* 148 L.T. 313, *Percival* v. *Dunn* (1885) 29 Ch.D. 128, *Palmer* v. *Carey* [1926] A.C. 706, *Howell* v. *Falmouth Boat Construction Co. Ltd.* [1951] A.C. 837, *Robertson* v. *Minister of Pensions* [1949] 1 K.B. 227.

CIVIL SUIT.

Henry Cheah for the plaintiffs.

Abdul Razak bin Dato Abu Samah (Senior Federal Counsel) for the first defendant.

Mohamed Azmi J.: This is a claim by Malayawata Steel Berhad against the Government of Malaysia and the Official Assignee for the sum of $215,618.64 being the balance of payment due for the supply of steel to Ng Kong Hooi Construction (hereinafter referred to as "NKHC") for the Radio House project at Bukit Putri, Kuala Lumpur. Malayawata's claim is based on an equitable assignment alleged to have been made in their favour with NKHC as assignor and the Government of Malaysia as the debtor.

From the evidence adduced in this case, I find the following facts have been established. By a written contract dated January 18, 1967, NKHC undertook to construct for the Government of Malaysia a broadcasting centre comprising a Radio House, two office towers and a large auditorium at Bukit Putri, Kuala Lumpur, for the sum of $7,870,013.95 (Exhibit D1). By exchange of letters dated June 25, July 2 and July 25, 1968, NKHC entered into an agreement with Malayawata under which the latter was to supply steel bars of various sizes for the construction of the Radio House project. (See Exhibits A10, A11 and A13). The terms of payment for the supply of the steel bars were by way of irrevocable 120 days Letter of Credit or by J.K.R. guarantee with 90 days credit. Eventually, these terms of payment were modified by the parties vide correspondence dated July 20, August 8 and August 10, 1968. (See Exhibits A19, A17, A18 and A16). It seems to me that this modification in the terms of payment forms the principal source of the present dispute. Malayawata allege that this final arrangement as to payment constitutes an equitable assignment whereby they become the assignee of monies due from the Government to NKHC in respect of steel supplied for the Radio House project, but the Government refutes this allegation. It is the Government's contention that there was merely an arrangement to make deductions from the progress payments due to NKHC as instructed by NKHC from time to time. To continue with the story, the firm of NKHC, of which Mr. Ng Kong Hooi is the sole proprietor, got into financial difficulties and in October 1969 Malayawata sued Mr. Ng by specially indorsed writ for the sum of $211,618.64, which was inclusive of the present claim vide Kuala Lumpur High Court Civil Suit No. 1797 of 1969 being the balance due in respect of steel bars supplied as at September 30, 1969. But before the case was ready for trial, on the petition of Jardine Waugh (M) Sdn. Bhd., Mr. Ng trading as NKHC was adjudged a bankrupt on March 30, 1970 vide Bankruptcy Petition No. 231 of the same year. Hence, the Official Assignee of Malaysia is brought in as a second defendant in the present proceedings to enable the court to adjudicate completely and finally the dispute between the parties.

Briefly, the case of Malayawata is that between August 9, 1968 and October 25, 1969 they supplied NKHC with 1,429.939 long tons of steel valued at $526,990.64 for the construction of the Government Radio House at Kuala Lumpur. Since a total sum of $311,372 has already been paid, there is now a balance of $215,618.64 due which is the subject-matter of the present claim. Although the contract for the supply of steel was made by Malayawata with NKHC, it is pleaded that by letter dated July 30, 1968 (Exhibit A17), NKHC informed and autnorised the Public Works Department to make direct payments to Malayawata for the amount of steel supplied from the progress payments due to NKHC by the P.W.D. in consideration of the contract made between Malayawata and NKHC. It is alleged that the said arrangement constitutes an equitable assignment in favour of Malayawata of all payments due to NKHC by the Government in respect of steel supplied. It is further alleged that, since the P.W.D. on behalf of the Government had by letter dated August 8, 1968 (Exhibit A18) acknowledged the said assignment and did make seven separate payments direct to Malayawata totalling $311,372 between October 24, 1968 and October 1969, the Government is therefore liable to pay over to Malayawata the balance sum of $215,618.64 still due to NKHC.

In the Amended Statement of Defence, the Government of Malaysia denies that there was an equitable assignment of all or any payments due to NKHC. It denies that the letter of August 8, 1969 (Exhibit A18) was an acknowledgement or confirmation of the alleged assignment. Regarding the seven payments to Malayawata, it is averred that the first four payments and the last payment were effected pursuant to an arrangement between the P.W.D. and NKHC, under which deductions were made from the progress payments due to NKHC and paid over to Malayawata from time to time as and when instructed by NKHC. The Government denies making the fifth and sixth payments in July and September 1969 and says that they were in fact paid by NKHC direct to Malayawata. It is therefore denied that such arrangement constitutes an equitable assignment of all or any payments due to NKHC and, as such, it is NKHC and not the Government who should be liable to Malayawata for whatever balance sum still due. The Government further pleads that even if there was an equitable assignment —

(a) Malayawata by their conduct and/or action are estopped from claiming equitable assignment, or are estopped from alleging that there was failure to comply with the terms of the assignment, and that in any event, the assignment was terminated on or before October 17, 1969, *i.e.* from the date when they filed the writ against NKHC for the recovery of the balance due;

(b) the equitable assignment is severable and existed only whenever the Government was instructed by NKHC from time to time to pay Malayawata from the progress payment due;

(c) the purported assignment was in breach of the terms of the contract between NKHC and the Government and to the extent of such breach, Malayawata's claim against the Government is invalid and barred.

There are two agreed issues in this case. They are: —

(1) Whether Malayawata supplied steel to NKHC for the construction of the Radio House and, if so, what was the quantity supplied and its value.

(2) Whether there was an assignment by NKHC to Malayawata in respect of all payments for steel delivered on the work site at the Radio House.

For purpose of convenience, I intend to deal with the second issue first. The law on equitable assignments is set out in *Halsbury's* Laws of England, Volume 14, Third Edition, from page 574. It is provided that in equity assignments are permitted both of contingent interests in real and leasehold estate and of choses in action. As regards choses in action, *Halsbury* has this to say at paragraph 1068:

"To constitute an equitable assignment of a chose in action no particular form of words is required; an engagement or direction by a debtor to pay out of a specified debt or fund constitutes an equitable assignment, though it does not operate as an assignment of the whole fund or debt. A mere charge on a fund or debt operates as a partial equitable assignment. Notice to the person owing the debt, or to the holder of the fund, is not necessary to complete the title of the assignee; but if he omits to give such notice, a subsequent assignee, who took without notice of the first charge, may, by giving notice, obtain priority over him."

It seems to me that there are three main ingredients of equitable assignments — an adequate mode, clear intention, and intimation to either debtor or assignee. As regards mode and form of assignment, no form of words is required for an equitable assignment. (See *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*[1] and *Durham Brothers* v. *Robertson.*[2] The assignment may be by word of mouth unless writing is required by law. As regards intention, it is necessary for the assignor to use such words so as to make the meaning plain. With regard to the last ingredient, the intimation to assign must be addressed either to the debtor or the assignee. Notice to the person owing the debt or to the holder of the fund is not necessary to complete the title of the assignee, but if he omits to give such notice, a subsequent assignee who took without notice of the first charge, may, by giving notice obtain priority over him. Thus, once these three ingredients are fulfilled, then there is an enforceable equitable assignment provided it is not contrary to public policy or does not conflict with basic equitable principles or contravenes the provisions of a statute. On the requirement of consideration, it depends on whether the disposition amounts to an absolute equitable assignment or it merely gives a charge on the property. In the former case, the entire interest of the assignor in the chose in action is for the time being transferred unconditionally to the assignee and placed completely under his control. In short, the assignee is put in the place of the assignor, in which case no consideration is necessary, and the assignment is good though voluntary. But in the latter case, the assignment operates by way of contract and requires a valuable consideration to support it, even though the consideration for the assignment is in respect of property to be afterwards acquired by the assignor. Therefore, the effect of an equitable assignment, and the extent to which consideration is required before it is upheld, depend to some extent upon the nature of the assignment as well as upon its subject-matter. A necessary distinction in this connection is that between absolute and non-absolute equitable assignments, the latter category includes conditional equitable assignments. It is also important to distinguish an absolute equitable assignment from an equitable assignment by way of charge only. Further, an assignment may not be treated as absolute if the assignor retains any beneficial interest in the subject-matter of the chose in action assigned or if the extent of what is assigned can be determined only upon an enquiry as to the state of accounts between the parties concerned. By contrast with an absolute assignment, a conditional assignment is one which is to become operative or ceases to be operative upon the happening of a certain event, and it is a useful test of this conditional nature that the person subject to the debt or liability in question (in the present case the Government) must necessarily be concerned with the state of accounts between the assignor and assignee before he deems himself justified in paying or requiting the assignee.

Based on the above proposition of the law on equitable assignment, it is necessary in this case to determine not only whether there is equitable assignment but also its nature. On the first matter, Malayawata should establish that the three prerequisities have been fulfilled. For this purpose, it is essential to consider the evidence in some detail as to the terms and mode of payments for the steel bars. From the evidence of Mr. Khoo Soo Pin, the Business Department Manager of Malayawata (PW1), it is admitted under cross-examination that the correspondence as contained in Exhibits A19, A17, A18 and A16 constitute the framework of the arrangement between the P.W.D. on behalf of the Government, NKHC and Malayawata, but the manner in which the arrangement is to operate is explained in Exhibits A20 and A22. The question to be determined is whether these correspondence are sufficient to fulfil the incidence of equitable assignment. As stated earlier on, orginally the terms of payment for the steel as between NKHC and Malayawata was either by irrevocable Letter of Credit or by P.W.D. guarantee. Subsequently, instead of by P.W.D. guarantee, it was agreed between NKHC and Malayawata that for payments of steel supplied NKHC should authorise P.W.D. to deduct the amount from progress payment due to NKHC and for the P.W.D. to make direct payment to Malayawata. Pursuant to this final arrangement, NKHC wrote Exhibit A17 to P.W.D. with copies to Malayawata office both in Kuala Lumpur and Butterworth. The second paragraph of the letter reads:

"In this connection, we hereby agree to authorise the P.W.D. to deduct from our progress payment and make direct payment to Malayawata Steel Berhad on the amount of steel supplied for the above project. We would like to have your written confirmation with a copy to Malayawata Steel Berhad that the P.W.D. can arrange the above."

The request to pay Malayawata direct was approved by the Treasury and the approval was conveyed by P.W.D. to NKHC and Malayawata vide Exhibit A18. Paragraph 2 of this letter reads:

"Your request has been considered by the Treasury and has been approved. However, please note that for purpose of progress payments, the deformed steel bars (whether as unfixed materials on site or incorporated in the works) will be valued in accordance with the conditions of contract. To assist the Quantity Surveyor in assessing the quantities of steel brought on to the site, please arrange for copies of Malayawata's delivery notes of the steel to be sent to this Office."

In the present case, it is my view that for Malayawata to succeed, there must be evidence to establish not only the existence of equitable assignment in respect of value of steel supplied for the Radio House project out of NKHC's progress payments due from the Government, but also that that equitable assignment is not unconditional or non-absolute. From the above correspondence, it is clear that the three prerequisites of equitable assignment have been established, and that the consideration for the assignment is the supply of steel to NKHC. However, it is equally clear that it is within the knowledge of all parties in this case that the assignment is subject to certain conditions and is not intended to be absolute. As stated by *Halsbury* at paragraph 1068, a direction to pay out of a specified debt or fund constitutes an equitable assignment, though it does not operate as an assignment of the whole fund or debt. From Exhibits A20 and A22, it is my finding that the manner in which the assignment was to operate is such that the equitable assignment is not for the whole progress payments due to NKHC under the terms and conditions of the building contract with the Government. In my view, the assignment is conditional and non-absolute. It is also severable and becomes enforceable only on an *ad hoc* basis whenever the P.W.D. was instructed by NKHC from time to time to make the payment direct. The framework of the assignment is that P.W.D. would on behalf of NKHC pay direct to Malayawata subject, firstly, to the condition that for the purpose of computing progress payment due to NKHC, all steel bars would be valued in accordance with the conditions of contract between NKHC and the Government, and the second condition is that, to assist the Government Quantity Surveyor in assessing the quantity of steel delivered at the work-site, copies of Malayawata's delivery notes or invoices should be sent to P.W.D. In the words of Mr. Khoo Soo Pin — a witness called by Malayawata, "NKHC had to certify the steel covered by our invoices is correct and thereby recommend to J.K.R. for payment". The first direct payment to Malayawata amounting to $108,767 was made by the P.W.D. some time in October 1968 as reflected in the schedule marked 'A' annexed to the Amended Statement of Claim. In my view, this sum constitutes a payment under the first *ad hoc* assignment. This finding is supported by what is stated in the final paragraph of Exhibit A20 and confirmed by Malayawata in Exhibit A22. To my mind, the effect of this correspondence is that as from September 18, 1968 —

(i) both the original and duplicate invoices should be submitted by Malayawata to NKHC, and only after they have been checked and verified that NKHC will forward the duplicate invoices to P.W.D.;

(ii) when forwarding the duplicate copy of the invoices, NKHC should also indicate to the P.W.D. the amount to be deducted from its progress payment and a copy of such instruction should be sent to Malayawata.

From that date, it becomes crystal clear that the assignment is conditional and severable, and NKHC the assignor is given the authority not only to decide when the money should be paid but also the amount to be assigned at a particular time out of the progress payments. This is consistent with the fact that out of fifteen progress payments due to NKHC, only five of them, namely, the fourth, eighth, tenth, eleventh and fifteenth progress payments were paid direct to Malayawata on the instruction of NKHC. (See Exhibit D page 1; Exhibit E page 57; Exhibit D page 30; Exhibit E page 59 and Exhibit P4). If it is the intention of the parties to make absolute assignment of all NKHC's rights to Malayawata, then there is no necessity to reserve to NKHC the power to direct P.W.D. as to the amount to be deducted from each progress payment. As it stands, for every payment, the P.W.D. must first receive instruction from NKHC as to the amount to be released to Malayawata. I find this position must be within the knowledge of all parties concerned since each party was in receipt of every relevant correspondence. Thus, from the letters sent by Malayawata to NKHC dated January 28 and March 1, 1969 (Exhibits A41 and A45), it can reasonably be inferred that *ad hoc* or severable assignment must have been agreed to by Malayawata. In Exhibit A45, in denying NKHC's contention that the arrangement constitutes a guarantee, Malayawata even went to the extent of saying that, "Your authority to the J.K.R. to deduct the amount due to us from any interim payment due to us does not constitute a guarantee as the J.K.R. do not underwrite your debt". In the last paragraph of the same letter, Malayawata also state:

"We believe that you have requested the J.K.R. to make another payment to us in March, and we look forward to receiving this payment. Please advise what the sum is likely to be."

There is therefore ample evidence that all the parties concerned acknowledged NKHC's right to give instruction to P.W.D. and to determine the amount to be assigned to Malayawata from any progress payment under the building contract, and as such Malayawata are estopped from saying that there has been a breach of the terms of the assignment. Since every payment by P.W.D. to Malayawata is subject to instruction from NKHC, it is small wonder that in none of the correspondence Malayawata can be said to have claimed to be an assignee of all progress payments due to NKHC under the building contract with the Government. Under the circumstances, if no instruction is forthcoming from NKHC as to the amount to be released from each progress payment, I do not think the Government can be held to be under any obligation to make payment to Malayawata. It may be argued that there were no such conditions to the assignment, since the first payment of $108,767 to Malayawata in October 1968 was made without the apparent instruction of NKHC. This is not really so.

It should be noted that this payment was made only after NKHC had written to Malayawata on September 13, 1968 with a copy to P.W.D. stating that in that particular instance it would not object to the payment although Malayawata had sent the duplicate invoices direct to P.W.D. instead of through NKHC. (See Exhibit A20). I therefore hold that the equitable assignment in respect of the present claim is conditional and non-absolute, and on the facts it is not enforceable and the claim should accordingly be dismissed.

The present claim must also fail on account of Malayawata's conduct after they came to know that the P.W.D. had on two occasions made payment to NKHC instead of to themselves. The first payment of $109,920 was made on December 19, 1968, and the second payment of $203,220 was made in February 1969. (See Exhibits A28 and A48 respectively). It is true that the first payment was an oversight on the part of the P.W.D., but if there had been an absolute equitable assignment, both payments would clearly constitute a breach of the terms of the assignment and one would have expected Malayawata to query P.W.D. or take action against the Government in view of the large sums involved. Instead, it is significant to note that on October 17, 1968, *i.e.* subsequent to the two payments, Malayawata brought a claim against NKHC for the sum of $221,618.64 being money due for steel supplied as at September 30, 1969 vide Kuala Lumpur High Court Civil Suit No. 1797 of 1969. If there had been an absolute equitable assignment, I hold that by Malayawata's conduct the said assignment was terminated or impliedly waived from the date of the filing of the specially indorsed writ. The conduct of Malayawata is not consistent with a claim that the arrangement as to the terms of payment between the parties constitutes an absolute equitable assignment. From the evidence, I find the assignment in the present case is not only conditional but also severable and, therefore, the present claim must necessarily fail. It is also significant to note that Malayawata's claim as assignee of the amount due was only brought up after Mr. Ng, the sole proprietor of NKHC, had been adjudged bankrupt on March 30, 1970. In all the circumstances of the case, I find Malayawata have so conducted themselves that there is an implied waiver and that it becomes inequitable for the court to enforce the equitable assignment, whatever may be the nature of such assignment.

As regards the seven payments referred to in paragraph 7 of the Amended Statement of Claim, PW1 agrees under cross-examination that the fifth and sixth payments of $1,500 each were in fact made by NKHC and not by the P.W.D. I therefore accept the contention of Government that the first four payments and the last payment were made by P.W.D. on the specific instruction of NKHC. Malayawata's allegation in the pleadings that all the seven payments totalling $311,372 were made by P.W.D. on behalf of the Government pursuant to the alleged equitable assignment cannot, therefore, be sustained by the evidence. For reasons already stated, those five direct payments by P.W.D. to Malayawata should be construed as payments made under severable and conditional equitable assignments.

In view of my conclusion, it is unnecessary for me to consider the defence contention that the purported assignment was in breach of clause 34(b)(iii) of the building contract between NKHC and the Government which prohibits any assignment without permission. Suffice for me to say that if absolute equitable assignment had been proved, I do not think this defence could succeed having regard to the fact that the P.W.D. and the Treasury were well aware of the correspondence regarding the assignment, and, as such, even if there was such a breach, it had been waived by implication.

On the first agreed issue, there can be no doubt that Malayawata did supply deformed steel bars to NKHC for the construction of the Radio House. The difficulty in this case is to ascertain the quantity actually supplied for the project and its value. The determination of this question is important in view of the principle that all assignments are subject to equities, and in equitable assignment an assignee cannot possibly have more right than the assignor against the debtor or fundholder. In the present case, it means that the Government is liable to pay Malayawata, if any, only what it is bound to pay NKHC under the building contract. Under clause 38 of the said contract, NKHC is entitled to be paid in addition to work done, in respect of materials and things properly supplied and stored upon the site. Therefore, I hold that even if absolute equitable assignment is proved, the Government is only liable for the value of Malayawata's steel actually brought onto the Radio House worksite, and the burden of proof on this particular issue is clearly on Malayawata. As contained in Exhibit C and the other documentary exhibits, the price depends on the various sizes of the steel bars. The evidence adduced by the plaintiffs have produced three different sets of figures as to the total quantity of steel for which they say the Government is bound to pay. The first figure is based on the invoices as contained in Exhibit C and on Exhibits A24, A25, A33 and A35. These exhibits show that 1429.99 long tons of steel were supplied in four batches by Malayawata to NKHC valued at $526,990.64 between November 9, 1968 and January 16, 1969. The second figure is given by PW2, the P.W.D. Chartered Quantity Surveyor who, under cross-examination, gave the figure of 1,367 long tons and eventually changed it to 866 long tons. The third figure is based on the site diary of the Radio House project (Exhibit P3 A & B).

As regards Exhibit C, both PW1, the Business Manager of Malayawata, and PW2, the P.W.D. Chartered Quantity Surveyor, have admitted in evidence that those invoices do not show how much of the steel supplied to NKHC was in fact delivered at the Radio House site. On this issue, I place more reliance on Malayawata's invoices (Exhibit C) than the letters written by NKHC as contained in Exhibits A24, A25, A33 and A35 for the simple reason that it was Malayawata's men who brought the steel bars onto the Radio House site. Very few of the invoices in Exhibit C show that the steel was delivered to the site. Other than the invoices at pages 1, 2, 3, 4, 6 and 7, all the other invoices do not state under the "Remarks" column that the steel bars were supplied at the Radio House site. PW1 in his testimony agrees that during that material period NKHC was undertaking other projects and PW2 also testifies that at that time NKHC

was also the contractor for the construction of the Subang Golf Club. It is therefore highly probable that NKHC had used substantial portion of the steel supplied for its other projects and, as such, the Government should not be liable for the value of all the steel as disclosed in Exhibit C. In my view, the invoices in Exhibit C merely show the amount of steel bought by NKHC, but they do not prove how much of the steel bought were actually delivered at the work-site for the use of the Radio House project. With regard to the P.W.D. Chartered Quantity Surveyor, who is a witness called by the plaintiff, his evidence does not support the figure claimed by Malayawata. In his testimony, he states that certain dimension of steel bars found on the site were not required for the Radio House project, and those that were required some did not come from Malayawata since Malayawata only produced certain dimensions of steel at that time. He also states that when the contract with NKHC was terminated and a new contract was awarded to Syarikat Pembenaan Raya Sendirian Berhad to complete the project on November 27, 1969, the total amount of steel found on site and incorporated was only 1,366.98 long tons, that is to say, less by 62.959 long tons than the figure claimed by Malayawata. Out of 1,366.98 long tons of steel incorporated and unincorporated, not all the steel could have come from Malayawata. Based on the sizes of steel bars, PW2 says under cross-examination, only 866 long tons could have come from Malayawata. In short, instead of 1,429.939 tons worth of steel, the Government merely received 866 tons. There is, therefore, a shortage of 563 tons. Even accepting the price of the steel at a flat rate of $370 per long ton irrespective of its different sizes, the value of 866 long tons of steel would come to $320,420. Since Malayawata have been paid a total sum of $311,372, it seems to me that at the most, only a sum of $9,045 and not $215,618.64 is due from the Government to Malayawata, even if the equitable assignment is enforceable. To complicate matters, there is the evidence of the site diary which contains a different set of figures regarding steel supplied on site.

From the above conflicting evidence adduced on behalf of the plaintiffs, it is clear that the total quantity of steel supplied by Malayawata for the construction of the Radio House at Bukit Putri cannot be properly ascertained. It is not the duty of the court to speculate on the actual worth of steel supplied by Malayawata and received by the Government. In the event, I hold that Malayawata have failed to prove what is the actual quantity of steel supplied and its value. In my considered opinion, even if Malayawata had been successful in proving that the equitable assignment is enforceable in that it is not conditional, or not non-absolute, or not severable, the present claim would still fail in view of the unsatisfactory evidence as to the amount of steel supplied and its value.

For the above reasons, I dismiss the plaintiffs' claim with costs.

Claim dismissed.

Solicitors: *Allen & Gledhill.*

TAN TOI LAN v. LAI KEE YING

[O.C.J. (Wan Suleiman F.J.) July 18, 1974]
[Seremban — Civil Suit No. 13 of 1972]

Workmen's Compensation — Claim referred to arbitrator — Arbitrator dismissing claim but without deciding questions referred to him — Appeal — Application for certificate not made within reasonable time — Whether plaintiff estopped from making the claim — Workmen's Compensation Ordinance, 1952, ss. 39(2) and 41(1)(a).

Arbitration — Award — Uncertain — Effect of.

The plaintiff had made a claim for workmen's compensation arising from the death of her husband whilst he was in the employment of the defendant. The claim was referred to the arbitrator and the questions referred were as follows:—

(a) whether deceased was a workman as defined in the Ordinance;

(b) whether the accident arose out of or was in the course of employment;

(c) whether the amount of compensation claimed for or any portion thereof was payable;

(d) whether the respondent was liable to pay such compensation as is ordered.

After a hearing the learned arbitrator dismissed the claim.

The plaintiff did not obtain a certificate from a judge of the High Court under section 39(2) of the Workmen's Compensation Ordinance but brought an action for damages. Subsequently the plaintiff applied for an extension of time to file an application for a certificate under section 39(2) and for the issue of such a certificate.

Held: (1) the order in this case was one where it was uncertain how it has decided the matters referred to the arbitrator and had the appeal been brought in time, there could be no doubt that it would have been set aside for uncertainty;

(2) no sufficient reason had been advanced for the inordinate delay in marking the application for a certificate and therefore the application for extension of time would be dismissed;

(3) the award in this case should not because of its uncertain nature estop the plaintiff from claiming that the defendant was the employer of her deceased husband and she is therefore not debarred from maintaining the suit under section 41(1)(a) of the Workmen's Compensation Ordinance.

Case referred to:-

(1) *Tan Kooi Neoh* v. *Chuah Tye Imm* [1958] M.L.J. 123.

CIVIL SUIT.

Atma Singh Gill for the plaintiff.

Leow Shin Fong for the respondent.

Wan Suleiman F.J.: This is an application by the defendant in Civil Suit No. 13 of 1972 under Order 25 r. 2, on a preliminary issue of law raised in paragraph 7 of the statement of defence.

The action abovementioned was brought by one Tan Toi Lan, the widow of one Ah Kaw @ Lew Kwae (deceased) on her own behalf as well as those of 7 other dependants against the applicant/defendant for damages for loss of support.

In her statement of claim the widow alleged that her deceased husband had died whilst he was in the employment of the defendant on 21st May 1970 whilst felling rubber trees at Tampin Linggi Estate, when a tree fell and hit the deceased.

After the death of her husband, the widow claimed Workmen's Compensation from Tampin Linggi Estate under section 27 of the Workmen's Compensation Ordinance, 1952, and since no agreement was reached, the question was referred to the President, Sessions